No. 11,891

IN THE

United States Court of Appeals

For the Ninth Circuit

ERNEST TSANG,
Appellant,

vs.

JOHN JOSEPH KAN,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Northern District of California awarding damages to the appellee, an Army veteran of World War II, in the sum of $7481.28, for loss of wages because of the unlawful refusal and failure of the appellant herein to reemploy appellee in the position which he occupied prior to his entrance into the service, or in any position of like seniority status and pay, contrary to Section 8 of the Selective Training and Service Act of 1940, as amended (50 U.S.C.A. App. 308) and Section 7 of the Service Extension Act of 1940, as amended (50 U.S.C.A. App. 357).[1]

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[1]See Appendix.

STATEMENT OF THE CASE.

Appellee can not accept appellant's statement on page 2 of his opening brief that the facts as he sets them forth "are without substantial dispute". The appellee believes that the facts are as found by the Court in its memorandum opinion and its findings of fact and conclusions of law approved in conformity with the said opinion.

Appellee now sets forth in full the memorandum opinion of the Court below and the findings of fact and conclusions of law it approved, because (1) of the dispute between appellant and appellee as to what is a correct "Statement of the Case", and because (2) he intends to rely strongly on this opinion and these findings, the authorities cited and legal principles enunciated therein, as his argument on appeal:

"MEMORANDUM OPINION

ROCHE, District Judge: This is an action brought under Section 8 of the Selective Training and Service Act of 1940, as amended. The petitioner originally sought employment reinstatement together with compensation for loss of wages and benefits resulting from respondents' alleged refusal to reinstate him, but he now asks only a money judgment for such compensation, waiving other rights that he may have under the Act.

Respondents defend on two grounds: First, that the issues herein have already been decided adversely to petitioner in certain proceedings in the superior court of the state of California, and second, that respondents offered to re-employ the

petitioner at the salary he was receiving when he entered the armed forces but that petitioner refused to accept the offer unless it would include a three year contract of employment.

The record discloses that the petitioner Kan was not only one of the founders of the Cathay House, a restaurant in San Francisco, but its active head and the man whose energy and ability were largely responsible for its phenomenal success. After its founding the respondent Tsang bought shares of stock in the business and he and the petitioner became the President and Secretary respectively, of the corporation. They were co-managers, each receiving the same salary. When Kan received a salary increase, Tsang likewise received an increase. When Kan enlisted in the armed forces on July 23, 1943, he and respondent Tsang were both making $500 a month. At that time, Tsang, by additional purchases of shares of stock, had gained a controlling interest in Cathay House.

While Petitioner was in the service the corporation was changed to a partnership, Tsang becoming a general partner and petitioner a limited partner, along with others. This change was agreed to by petitioner's wife, who was also employed at Cathay House and to whom petitioner had given power of attorney, but the evidence is conflicting as to whether she and her counsel endeavored to have the change delayed until the petitioner came home on leave. In any event, the change was one of form only. The interested parties remained the same and the restaurant business was conducted as before. Such a reorganization was ineffective to cut off the petitioner's rights under the Selective Service Act.

The petitioner was honorably discharged from the service on November 26, 1943, and shortly thereafter asked respondent Tsang to reemploy him. Tsang was then earning $750 per month.

From this point on the record contains much conflicting testimony but it does clearly appear that at no time during the negotiations that followed petitioner's request for reemployment was the petitioner offered the position of co-manager with the same salary as Tsang was then receiving. The most that was offered was his old salary of $500 a month and there is persuasive evidence that even that offer was conditioned on Kan's signing what the parties denominated a 'waiver' or 'release'. The situation culminated in Tsang's filing an action for declaratory relief in the state court, in which Kan filed an answer and cross-complaint. Judgment was given in favor of Tsang. Kan and three others subsequently filed a suit for an accounting and dissolution of the partnership. The partnership was dissolved and the property sold, Tsang being the purchaser.

Respondents' defense of res judicata is based on the foregoing state court proceedings. It is true that the state court made a finding that respondent Tsang and the partnership had offered to restore Kan to the same position which he had held with the Cathay House corporation, but even assuming that such an offer met the Act's requirements, this finding cannot bind a federal court. The same defense of res judicata, based on a declaratory judgment rendered by the Ohio state court, was raised by the respondents in the case of *Trailmobile Co. v. Whirls,* 154 F. 2d 866, an action by a veteran for restoration to his seniority status as it existed prior to his entry into

military service. The Sixth Circuit Court of Appeals disposed of the defense in the following language: 'The interpretation by the state court of the rights of a citizen under a federal statute is not binding upon the federal courts.' The question for decision is thus one of fact—did any offer of reemployment made by respondents to petitioner comply with the terms of the Act.

So far as pertinent, the Act provides that if a position, other than a temporary position, was in the employ of a private employer, the person so employed shall be restored to such a position unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. It is further provided that such restoration shall be without loss of seniority. The courts have been very liberal in construing these provisions, having in mind the purpose of the statute. They are more than patriotic promises. Rather, they are a guarantee to the honorably discharged veteran that, upon application timely made, he will be restored to his former position or to one of like seniority status and pay and that he will lose no seniority in the process. If during the veteran's service in the armed forces, the person filling his position receives a higher salary, an offer to reemploy the veteran at his old salary is not a compliance with the Act. The veteran must be given the benefit of any wage increases that have been made during his absence. *Salter v. Becker Roofing Co.,* 65 F. Supp. 633. To the same effect are the decisions of the United States District Court for the Southern District of California in *Parker v. Boyce* and *Covey v. Douglas Aircraft Co.*

In the instant case, when the petitioner enlisted in the army he was co-manager with the respondent Tsang of the Cathay House and received the same salary. Upon his honorable discharge and application for reemployment, he was entitled to be restored to the position of co-manager and to receive the same salary that Tsang, the other co-manager, was receiving. An offer of anything less was not a compliance with the Act provisions, nor was an offer conditioned on the veteran's waiving or releasing any of his rights guaranteed by the Act. Since the evidence conclusively shows that respondents failed to offer to restore the petitioner to his position as co-manager at the increased salary which respondent Tsang was then being paid, it follows that judgment must be entered in favor of the petitioner.

Petitioner having waived his claim for reinstatement and for all back pay, except for a twelve month period, it is

ORDERED that there be entered herein, upon findings of fact and conclusions of law, judgment in favor of the petitioner in the sum of $7,481.28, that being 12 months back pay at $750.00 a month less $1,518.72 earned by him from December 4, 1943, the date of his application for reinstatement, to December 4, 1944, and that respondents shall bear the costs.

Dated: November 13, 1947.

MICHAEL J. ROCHE,
United States District
Judge."

(Tr. 15-19.)

"Findings of Fact and
Conclusions of Law.

This case came on for trial September 10, 11 and 12, 1947, before Honorable Michael J. Roche, United States District Judge, sitting without a jury; the petitioner, John Kan, appearing by his attorneys, Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, Rudolph J. Scholz, Esq. and Joseph Karesh, Esq., Assistant United States Attorneys for the said district; the respondents Ernest Tsang, L. M. Carter, George Chew, Philip Fong and Paul Yuke, by their attorney, Robert E. Hatch, Esq., and the other respondents George Chin and Fred Leong, by consent filed in open Court, consenting to a judgment in favor of petitioner, and the evidence having been received and the matter having been orally argued and briefed and fully considered, the Court now makes its findings of fact and conclusions of law as follows:

Findings of Fact.

I.

This is an action under Section 8 of the Selective Training and Service Act of 1940, as amended, 50 U.S.C.A. App. 308, and Section 7 of the Service Extension Act of 1941, as amended, 50 U.S.C.A. App. 357, and the jurisdiction of this Court is based thereon.

II.

Petitioner is a resident of the City and County of San Francisco, State of California.

III.

Respondents at all times herein mentioned were a copartnership consisting of Ernest Tsang, a General Partner, and L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, together with petitioner and Helen Kan, his wife, as Limited Partners, and maintained a place of business, a restaurant known as the CATHAY HOUSE, at 718 California Street, San Francisco, California. At the time petitioner left the employment of respondents it was a corporation and was changed to a copartnership while petitioner was in the Army of the United States. Prior to September 28, 1939, petitioner Kan, in association with an individual, not a party to this action, commenced the business of operating Cathay House. Petitioner Kan interested respondent Tsang in purchasing stock in the said corporation. Respondent Tsang become President and Kan became Secretary of said corporation and they were the sole persons actively engaged as managers in the actual operation of the restaurant. The interests of the other stockholders were financial only.

IV.

On or about the 23rd day of July, 1943, at San Francisco, California, petitioner volunteered for service in the armed forces of the United States and was inducted into the Army of the United States and immediately thereupon entered the said service. Immediately prior to petitioner's entrance into said service he was employed by the aforesaid corporation as a General Manager thereof at a salary of $500 a month. Immediately

prior to petitioner's induction into the Army of the United States respondent Ernest Tsang was likewise employed by the aforesaid corporation as a co-manager thereof at a salary of $500 a month. At one time prior to petitioner's induction into the service, petitioner and respondent Tsang were compensated at the rate of $200 per month. Thereafter both petitioner and respondent Tsang received simultaneous increases in pay from $200 to $300 a month, and from $300 per month to $500 per month.

V.

At the time petitioner entered the Army of the United States respondent Tsang was the owner of the majority of the stock in the aforesaid corporation. When the aforesaid corporation was changed to a copartnership respondent Tsang had the majority and controlling interest in the said copartnership and was in charge of the said business. During the time petitioner was in the armed forces respondent Tsang's salary was raised from $500 per month to $750 per month.

VI.

Petitioner left his aforesaid position on or about the 23rd day of July, 1943, for the sole purpose of entering the military service of the United States. Shortly before this date petitioner, in preparation for departure for the armed forces, executed and delivered to his wife, Helen Kan, a power of attorney to act for him in his absence, in connection with said business. At or about the same time, respondent Tsang, as President of the said corporation and the sole re-

maining active manager, promised and agreed with petitioner and his wife, Helen Kan, that he, respondent Tsang, would diligently protect petitioner's interests in the business. Thereafter Helen Kan assented, on behalf of herself and the petitioner, to the change of Cathay House from a corporation to a copartnership. The change was one of form only. The interested parties remained the same and the restaurant business was conducted as before.

VII.

Petitioner satisfactorily completed his period of service in the Army of the United States on the 26th day of November, 1943, and on that date received an honorable discharge evidencing such satisfactory completion.

VIII.

On or about December 4, 1943, petitioner made timely application to Cathay House, and more particularly to respondent Tsang, for restoration to the position hereinabove described.

IX.

The former position, hereinabove described, left by petitioner on or about the 23rd day of July, 1943, to enter the Army of the United States, was a position other than temporary. At the time of his application for his former position, and at all times thereafter, petitioner was qualified to perform the duties of said position as set forth under the law.

X.

Petitioner in making application for reinstatement, stated to the respondent Tsang that he believed he was entitled to the same salary as that which respondent Tsang received, to-wit, $750 a month, but declared that he was willing to work for $500 per month until the amount of salary would be definitely determined.

XI.

During December, 1943, and January, 1944, petitioner continued to request of respondent Tsang reinstatement to his former position and negotiations were carried on during this period of time. In the latter part of January, 1944, respondent Tsang refused to reinstate petitioner at a salary of $500 a month without attaching certain conditions to petitioner's reemployment. These conditions were: that petitioner sign a release waiving any rights he might have under the Selective Training and Service Act, approving the change of the Cathay House from a corporation to a copartnership and transferring his stock to his wife, Helen Kan. Petitioner stated he would not sign such a release to be employed at $500 a month unless he were given a three-year contract. Respondent Tsang stated that under no condition would he employ petitioner for any period of time without petitioner signing the release, as above described, at a salary no more than $500 per month.

XII.

Respondent Tsang at all times has refused to reemploy petitioner at a salary of $750 a month.

XIII.

Respondent Tsang determined at the time petitioner made the request for reemployment, that he would under no circumstances rehire said petitioner at any salary and the conditional offer of reemployment that he made was such that he knew the petitioner would not accept it and such conditional offer constituted a subterfuge to prevent petitioner's reemployment.

XIV.

Immediately thereafter, as was his legal right, petitioner sought the assistance of the United States Attorney, who attempted to negotiate a settlement with the respondent Tsang through his counsel, Robert E. Hatch, Esq. These negotiations were continued through April of 1944. Petitioner indicated a willingness, through the United States Attorney, to be reemployed at a salary of $500 a month, but respondent Tsang, through his said attorney, denied that he had any liability to reinstate petitioner to his former position under the Selective Training and Service Act of 1940 and continued in his refusal to reinstate said petitioner.

XV.

Thereafter, and on or about the 20th day of October, 1944, respondent Tsang filed a complaint for declaratory relief against the petitioner in the Superior Court of the City and County of San Francisco in connection with petitioner's reemployment rights. Petitioner filed an answer and a cross-complaint to protect his interests. The decision of the Superior Court of the City and County of San Francisco is of no moment here,

inasmuch as such decision of the State Court is not res adjudicata to the issues involved in our case herein.

XVI.

During the war years the profits of the Cathay House increased enormously. It was not unreasonable that the petitioner should have been reemployed at the Cathay House in the position of co-manager at a salary of $750 a month. The position in said business of like seniority, status and pay to which petitioner is entitled is that of co-manager with respondent Tsang at a salary of $750 per month.

XVII.

Respondent Tsang in no way has been injured by petitioner's delay in instituting this action, such delay having been occasioned by the proceeding in the State Court instituted, as hereinabove stated, by the respondent Tsang. Respondent Tsang has likewise not been injured by the delay in bringing this case to its conclusion, the greater part of such delay being the result of a stipulation between counsel herein. The remaining respondents likewise have not in any way been injured by the delays hereinabove set forth.

XVIII.

Petitioner was ready, willing and able to work for respondents from December 4, 1943 to December 4, 1944, and continuously thereafter, but as a result of the unlawful action of the Cathay House, and more particularly that of respondent Tsang, petitioner was not reinstated. From December 4, 1943 to December 4, 1944, petitioner

earned in another position the sum of $1518.72. By reason of the respondents' unlawful action, and more particularly that of respondent Tsang, in failing and refusing to reemploy petitioner, either in his former position or in a position of a like seniority, status and pay, he suffered a loss of wages between December 4, 1943 and December 4, 1944, in a sum of $7481.28, that is to say, he, the petitioner, suffered a loss of twelve months' pay at $750 a month, less $1518.72.

XIX.

Petitioner does not request or desire reinstatement to his former position, but at no time since December 4, 1943, did petitioner abandon his right to reemployment and reinstatement in his former position with the Cathay House, and at all times has diligently pursued his claim for such employment.

Conclusions of Law.

The reorganization of the Cathay House from a corporation to a copartnership was ineffective to cut off petitioner's rights under the law.

Respondents, and more particularly respondent Tsang, unlawfully failed and refused from December 4, 1943 to December 4, 1944, and at all times thereafter, herein mentioned, to reemploy petitioner in his former position or in any position of like seniority, status and pay, contrary to Section 8 of the Selective Training and Service Act of 1940, As Amended (50 U.S.C.A. App. 308), and Section 7 of the Service Extension Act of 1940, As Amended (50 U.S.C.A. App. 357), and by reason thereof, petitioner suffered loss of

wages amounting to $7481.28 between December 4, 1943 and December 4, 1944, and is entitled to be compensated by the respondent Ernest Tsang, General Partner, and by the said copartnership, consisting of the said Ernest Tsang, General Partner and the respondents L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, Limited Partners, doing business, together with petitioner and Helen Kan, his wife, also Limited Partners, under the name of Cathay House, in the said amount of $7481.28.

Let judgment be entered accordingly forthwith, with costs of suit to be paid by respondents hereinabove described.

Dated at San Francisco, California, January 16, 1948.

MICHAEL J. ROCHE
United States District Judge."

(Tr. 20-28.)

THE LAW AS FOUND BY THE COURT.

After finding, most significantly, among other things, as a fact that "respondent Tsang determined at the time petitioner made the request for reemployment that he would under no circumstances rehire the said petitioner at any salary and the conditional offer of reemployment that he made was such that he knew the petitioner would not accept it and such conditional offer constituted a subterfuge to prevent petitioner's reemployment", (Finding of Fact, XIII, supra), the

Court enunciated, as an analysis of his opinion will show, the following legal principles:

1. Reorganization of a business from a corporation to a partnership while the employee is in the armed forces is ineffective to cut off employee's rights while interested parties remain the same and the business is conducted as before.

2. Finding of State Court that veteran had been offered restoration of employment in conformity with requirements of the Selective Training & Service Act is not *res judicata* and binding on the Federal Court.

3. Veteran must be given the benefit of any wage increases offered during his absence and any lesser offer is not a compliance with the Act.

4. Any offer of reemployment conditioned on the veteran releasing or waiving any of his rights guaranteed by the Selective Training & Service Act is not a compliance with the said Act.

5. Veteran who is refused reinstatement for a period greater than twelve months and who before the Court during trial waives his claim for reinstatement is at the least entitled to receive twelve months' back pay, with all increases accruing to the position during his service in the armed forces, less what he actually earned during this period in other employment.

CONTENTIONS OF APPELLANT.

In urging this Honorable Court to reverse the judgment of the court below appellant, in his opening brief, makes the following contentions:

1. "The judgment appealed from is contrary to law in that the judgment of the State Court was res judicata."

2. "The award of damages was contrary to the evidence and law applicable thereto."

3. "The expiration of the partnership term barred any relief."

4. "Petitioner was estopped from any relief."

ARGUMENT.

A comparison of the *"Law as Found by the Court"* with the contentions made by the appellant shows that he does not dispute the Court's first proposition, supra, that reorganization of a business from a corporation to a partnership while the employee is in the armed forces is ineffective to cut off the employee's rights while the interested parties remain the same and the business is conducted as before — which is the situation in our case at bar. Accordingly appellee will not concern himself with this principle which is so firmly established.[2]

It is likewise apparent from a reading of appellant's opening brief that he does not challenge the Court's third proposition, supra, that any offer of reemploy-

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[2]See *Doane Co. v. Martin* (CCA-1), 164 F. (2d) 537, where it was held that a change in stock ownership of a corporate entity while the veteran was in the service did not warrant refusal to reemploy. See also *Brown v. Luster,* 165 F. (2d) 181, wherein this Honorable Court held that the continuation of a partnership business in the form of a corporation was no justification to deny veteran reemployment. See also *Sullivan v. Milner Hotel Co.,* 66 Fed. Supp. 607, 610; *Karas v. Klein,* 70 Fed. Supp. 469.

ment conditioned on the veteran releasing or waiving any of his rights guaranteed by the Act is not a compliance with the Act. What appellant apparently does attack is the finding of the Court that the offer of reemployment he made to appellee was a conditional one. Accordingly, our concern is not with this legal principle which is likewise firmly established, *Burkhardt v. Crucible Steel Co.,* 68 Fed. Supp. 802. but with the question as to whether the evidence supports the finding that the offer of reemployment made by appellant was a conditional one and not made in good faith.

I.

IS THE FINDING OF THE COURT THAT APPELLANT'S OFFER OF REEMPLOYMENT TO APPELLEE WAS A CONDITIONAL ONE, AND A SUBTERFUGE, SUPPORTED BY THE EVIDENCE?

Bearing in mind the familiar rule that the Court is the sole judge of the credibility of witnesses in a trial before it without a jury, and the equally familiar rule that findings of the Court cannot be set aside unless clearly erroneous,[3] appellee will now show that he should be sustained in this phase of the case.

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[3]*Gimpelson v. Kaufman, et al.,* No. 11,660, decided April 20, 1948, ... F. (2d) ....., wherein this Court in deciding a veteran's reemployment suit stated:

> "There is credible evidence in this case adequately supporting the findings of the trial court on the material issues and they must be sustained since we cannot say that they are clearly erroneous. In this case the conclusions drawn from the facts disclosed in the evidence had to rest in the sound judgment of the trial court. There was conflict in the testimony, and whatever the doubts generated by this state of the record, it is not

The following testimony of appellee on direct examination clearly indicates that the offer of reemployment was a conditional one, that not only was appellant unwilling to reemploy him without imposing conditions, for a salary of $500 a month, but also that appellant refused under any circumstances to pay him $750 a month:

> "Q. Did Mr. Hatch say anything else that he wanted you to sign over at that time, anything about a release of any kind?
>
> A. By Mr. Kang: Well, on January 20th he wanted me to sign——
>
> Q. I am talking about January 24th.
>
> A. He did discuss a release at that time, on January 24th, but being that I felt there was no protection for me whatsoever if I signed over all my stock and signed a release and signed away all my right, which I had under Selective Service, I wanted a contract of employment such as Mr. Tsang had. So finally Mr. Romer suggested why didn't I go back to work without signing any papers of any sort, 'Why don't you go back to work?' And then finally Mr. Romer suggested that Mr. Tsang and I had known each other all these years, 'Why don't you get together and discuss it without the presence of attorneys?' And that was the crux of that meeting, and it was finally decided that Mr. Tsang and I would discuss it ourselves.

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for this court to substitute its judgment on the evidence for that of the trial court on the probative weight of the evidence. The questions presented by the pleadings and evidence made the final determination of the trial court decisive of every material factual issue. Determination of these factual issues leaves no substantial legal issue in this case; the legal consequences of the trial court's findings are explicitly provided in the reemployment statute."

Q. At any of these meetings up to and including January 24, was $750 offered to you at any time?

A. No.

Q. Now, you said that meeting terminated on January 24 that you and Tsang were to get together on another meeting.

A. That is correct.

Q. Did you do so?

A. Yes, I did go back to see Mr. Tsang.

Q. How long after January 24, 1944, was that meeting?

A. I don't remember the exact date, but I think it was about a week after that I went to the Cathay House to see Mr. Tsang.

Q. Was there anybody else there besides you and Mr. Tsang that day?

A. No, just Mr. Tsang and myself, and he seemed to be agreeable to my coming back to work, and also that he would give me a contract of employment such as he had. However, he said, 'I do not think this can be final until I think about it further,' so a few days later when I did go back I asked for my job at $500 a month again.

Q. Just a minute. At that meeting shortly after January 24th you say that Mr. Tsang was apparently in a friendly mood and agreed to give you a contract of employment?

A. Yes.

Q. Was there any condition attached to that? Did he state that you would have to do any particular thing?

A. No, there was not. It was a very short meeting.

Q. Was anything finally decided?

A. I was led to believe at that meeting that I was ready to go back to work.

Mr. Hatch: Is that the meeting of January 24th?

Mr. Scholz: No, it was shortly after that.

The Court: The week following the 24th, approximately?

Mr. Scholz: That was the week following?

A. About a week following January 24, and I thought that I was ready to go back to work. Then a few days later when I did go back to see Mr. Tsang he was very arrogant and said he did not want to talk about the matter, and just walked away, and I walked out; he didn't want me to come up to the Cathay House and be there any more.

Q. What did he say and do at that meeting?

A. I told him at that time that I was ready to go back to work—I said, 'Now, we are going to get together on this, I am willing to go back at $500 a month.' And he said, 'Well, I thought one time things would work out but it won't work out now,' and he just walked away.

Q. He refused to discuss it?

A. He refused to discuss it.

Q. Did that terminate your endeavor to have Tsang re-employ you?

A. It did.

Q. As far as you were concerned?

A. That is right.

Q. What did you do next about re-employment? Did you go to the Selective Service or any place else?

A. I conferred with Mr. Romer and told him what had transpired in my discussion with Mr.

Tsang, and finally we did make application to the Selective Service to hear the case. The draft board, I believe, received a letter from me with all of the details.

Mr. Karesh: About when?

A. I believe that was—I have the letter right here, a copy of the letter, if you wish to see it.

Q. That was shortly thereafter?

A. It was about a month or two later. I understand that the draft board was unable to make a decision on it, and they sent it to Sacramento, and it laid up there for almost a year, and no action was taken.

Q. Mr. Scholz: Then the United States Attorney's Office contacted you?

A. I finally contacted Mr. Karesh and told Mr. Karesh about the case."

(Tr. 94-97.)

To the same effect is the testimony of Sidney A. Romer, Esq., one of the attorneys for appellee in the State Court proceedings, at pages 119, 120 and 121 of the Transcript.

Furthermore, from the lips of the appellant himself during the proceedings before the trial Court came these words which show that he never intended to comply with the Act, that the negotiations he conducted were a sham:

"Cross Examination

Q. By Mr. Karesh: You testified on direct examination that you always were willing to give Mr. Kan his job back?

A. I have been.

Q. Up to what point have you been?

A. Up to the point of the gun incident.

Q. What was the date of the alleged incident with the gun?

A. The incident of the gun occurred the early part of December, 1943, shortly after he returned from the Army.

Q. Then in December, 1943, you were not going to give him his job back?''

(Tr. p. 247.)

Realizing the damaging admission that appellant had just made, his counsel then spoke up: ''That is objected to as being irrelevant and incompetent.'' But the Court considered it material, as its subsequent finding in this regard shows, and ruled, ''He may answer.'' (Tr. p. 247.)

The answer of the appellant was extremely feeble. Having placed himself in an extremely untenable position appellant was unable to repair the damage although he tried:

''A. By Mr. Tsang: It was not until January, at the meeting in Mr. Hatch's office, that I did not want to give him back his job, but up to the time of the gun incident I was still willing to give him back his job if Mr. Hatch could proceed along lines to bring us into harmony.

Q. Then there were no conditions attached?

A. They were conditions of my own.

Q. It was at that time that you resolved you were never going to give him the job back?

A. I did not resolve not to give him his job back.

The Court: Is that all with this witness?
Mr. Karesh: That is all."
(Tr. pp. 247-248.)

Why, then, did the appellant make the damaging admission? Appellee believes the following is a reasonable explanation: In his direct examination appellant, in an obvious attempt to impress the Court with his magnanimity, stated that he had always been willing to reemploy appellee, but when counsel for appellee asked him, "You always were willing to give Mr. Kan his job back?" appellant decided he had gone too far. If he did not retract, he might then and there be asked to reemploy appellee, so as an excuse he created out of thin air the "gun incident" even though it was based completely on hearsay. (Tr. p. 165.)

The following recitation from the record now becomes very material to dispel any possible doubt that appellant at any time intended to comply with the Selectice Service Act:

On or about January 24, 1944, after a conference between the parties and their attorneys Kan was not reemployed. Thereafter he sought redress with the Selective Service officials and the United States Attorney. The United States Attorney discussed the matter with appellant's attorney, Robert E. Hatch, Esq. A letter received by the United States Attorney from Attorney Hatch, under date of April 20, 1944, stated that the Cathay House would under no circumstances reemploy Kan. (Appellee's Exhibit 8, Tr.

215-217.) To be sure, this letter was dated more than ninety days after Kan received his honorable discharge from the Army, but regardless of this lapse of time it is expressive of the harsh attitude on the part of appellant toward appellee, and it should be remembered that negotiations had been started earlier between the attorney for appellant and the United States Attorney. (Appellee's Exhibit 7, Tr. 213-214.)

Why this attitude on the part of appellant toward appellee? Perhaps it is the old story of the recipient of a kindness hating his benefactor and turning upon him. It was Kan who took Tsang into the Cathay House, as a result of which Tsang grew rich. Are these words of appellee too strong? Not when we consider the bitter and unsupported assertion made by counsel for appellant in the closing line of his opening brief, page 18: "We submit that the relief granted against Tsang under such circumstances was abhorrent to all concepts of fairness and the courts should rule Kan to be estopped." Perhaps the best answer to this unwarranted complaint was best expressed by the court in its opinion: "The courts have been very liberal in construing these provisions, having in mind the purpose of the statute. *They are more than patriotic promises.*" (Italics supplied.)

II.

IS THE JUDGMENT OF THE STATE COURT RES JUDICATA?

Here the appellant and the Court are in complete disagreement. But the Court below has the case of *Trailmobile v. Whirls,* 154 F. (2d) 866,872, reversed on other grounds, 328 U. S. 831, as authority for the second proposition which it advances, while the appellant has no authority to buttress his position. To be sure, appellant cites cases, but none of them are concerned with the identical problem of the right of reemployment arising under the Selective Service Act. The reason appellant cites no cases in point to give him comfort is because undoubtedly there are none. Appellee has searched the authorities; the *Trailmobile* case is the only one he has found exactly in point, but this single case, in the light of the statute involved and the unequivocal declaration made therein by the Court of Appeals for the Sixth Circuit is adequate to sustain the Court below:

> "This declaratory judgment of the state court is not binding upon this court. If recognized here, the judgment of the Ohio courts would nullify the right of the appellee Whirls to his seniority status as an employee of the appellant company as of February 8, 1935. His seniority status as of that date is, as we have already shown, guaranteed by the Selective Training and Service Act as long as the Act remains in effect and as long as Whirls remains in the service of the appellant company."

Much has been said by appellant about the State Court's decision being adverse to the appellee. It

must be remembered, however, that it was Tsang who originally harassed Kan in the State Court by first filing a suit for declaratory relief, thus compelling Kan to file a cross-complaint. (See footnote, p. 5 of Appellant's Opening Brief.)

In this connection appellee can only conjecture whether the State Courts would have decided, as did the Court below, that an offer of any salary less than $750 a month did not satisfy the requirements of the Selective Service Act, had this question been squarely presented. That the appellant would not under any circumstances pay appellee $750 a month as the Court below found (Finding of Fact XIII, supra), cannot be disputed. That this precise question of the $750 monthly salary was not determined by the trial judge in the State Court proceedings may be clearly seen by a reading of the Findings which he approved. (See p. 5 of Appellant's Opening Brief.) Be that as it may, appellee, as he has already stated, relies on the case of *Trailmobile v. Whirls,* supra, and these words of the Court below:

> "Respondents' defense of res judicata is based on the foregoing State Court proceedings. It is true that the State Court made a finding that respondent Tsang and the partnership had offered to restore Kan to the same position which he had held with the Cathay House corporation, but even assuming that such offer met the Act's requirements, this finding cannot bind a federal court * * *. The question for decision is then one of fact—did any offer of re-employment made by respondent to petitioner comply with the terms of the Act?"

III.

MUST THE VETERAN BE GIVEN THE BENEFIT OF ANY WAGE INCREASE OFFERED DURING HIS ABSENCE TO CONSTITUTE A COMPLIANCE WITH THE ACT?

Appellant in his second contention, in which he alleges not only that the award of damages is contrary to the evidence but also to the law applicable thereto, is challenging the Court's third proposition that failure to give the veteran the benefit of any wage increases accruing during his absence is not a compliance with the Act. Appellant does so on page 16 of his opening brief, in language and with reasoning difficult for appellee to understand:

> "The District Court held that Kan actually was entitled to $750 per month and that the employer breached his statutory obligations by not agreeing to restore the position at more than $500 per month. (Tr. 26.)
>
> In this respect we contend the court was in error. The former employee had the undoubted right to accept a lesser pay than the maximum to which he was entitled. When he told the employer that $500 was the amount he 'would be satisfied with' there could have been no obligation, statutory or otherwise, upon the employer to *insist* upon him taking more. In the absence of an obligation, no one could be responsible for damages for a breach."

In the face of such inconsistent reasoning by appellant appellee calls attention of this Honorable Court to the following declaration the Court below made in its opinion, in which in support thereof it

cited, *Salter v. Becker Roofing Co.,* 65 Fed. Supp. 633; *Parker v. Boyce,* 74 Fed. Supp. 581, and the as yet unreported case of *Covey v. Douglas Aircraft Co.* (S. District of California):

> "So far as pertinent, the Act provides that if a position, other than a temporary position, was in the employ of a private employer, the person so employed shall be restored to such a position unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. It is further provided that such restoration shall be without loss of seniority. The courts have been very liberal in construing these provisions, having in mind the purpose of the statute. They are more than patriotic promises. Rather, they are a guarantee to the honorably discharged veteran that, upon application timely made, he will be restored to his former position or to one of like seniority, status and pay and that he will lose no seniority in the process. If during the veteran's service in the armed forces, the person filling his position receives a higher salary, an offer to reemploy the veteran at his old salary is not a compliance with the Act. The veteran must be given the benefit of any wage increases that have been made during his absence."

In *Parker v. Boyce,* supra, the Court held that the veteran whose salary, prior to his entry into the service, as manager of an advertising business had been $300 a month, was entitled to reinstatement at $600 a month, which was the salary of the incumbent manager upon the veteran's return from military service.

instatement for a period greater than twelve months, and who before the Court during trial waives his claims of reinstatement is at the least entitled to receive twelve months back pay, with all increases accruing to the position during his service in the armed forces, less what he actually earned during this period in other employment. As a matter of fact, appellee is entitled under the Act not only to damages for loss of wages but also reinstatement for a period of one year. Section 8(e) of the Act requires the employer to compensate the veteran for any loss of wages suffered by reason of failure to reemploy. Accordingly, back pay continues until the actual date of restoration, or waiver thereof. The one-year provision in Section 8(c) cannot therefore be considered a limitation on back pay claims, since the one year period is measured from the date of restoration to the job. Thus, following the specific language of the Act, the veteran is entitled to back pay until he is restored to his job, and is also entitled to claim immunity from discharge without cause for one year after such restoration, regardless of when it takes place. If we assume, but for purpose of discussion only, that the provision of Section 8(c) is a limitation, then the veteran is entitled only to back pay or reemployment or both, for a total period of not more than a year, but certainly nothing less than that. For example, a veteran who is restored to work six months after he was unlawfully refused reemployment would be awarded six months back pay and employment for the balance of a year. If, as in our case at bar, the

veteran is refused reemployment for a period greater than one year he would be entitled to back pay for a year. The Court below, in view of appellee's waiving his right of reemployment and back pay for the period in excess of one year, properly ordered that there be entered "judgment in favor of the petitioner in the sum of $7421.28, that being twelve months back pay at $750 a month less $1518.72 earned by him from December 4, 1943, the date of his application for reinstatement, to December 4, 1944."[4] The damages so awarded were compensatory and not punitive and based on the fact that the appellee had actually suffered a loss of $7421.28 from December 4, 1943, to December 4, 1944, as a result of the employer's unlawful act.

A reading of the appellant's opening brief, and particularly the third and fourth contentions therein, shows that he does not challenge the Court's fifth proposition as such but that he insists that it is not applicable to appellee under the circumstances of this particular case. It is difficult for appellee to comprehend the arguments of appellant in support of his third and fourth contentions that (3) "The expiration of the partnership barred any relief," and that (4) "The petitioner was estopped from any relief." On page 17 of his opening brief appellant asserts that:

> "This returns us to the solemn assurance in 1946 by counsel for the petitioner that the Fed-

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[4]Appellee was very fair and diligent in seeking other employment and mitigating damages. (Tr. p. 139.) For rule on mitigation of damages see *Doane Co. v. Martin*, supra.

> eral Court could and should take jurisdiction because the reemployment was the only relief sought herein, while conceding that it already had been competently adjudicated that he was entitled to no damages.
>
> However, when realization of this point was reached, petitioner reversed to the exact opposite position and the only relief granted by the District Court was for damages."

A careful reading of the Transcript of Record will show no such "solemn assurance," as a reading of appellant's opening brief shows no cases to support his third and fourth contentions.

As, what appears to be, an afterthought on the part of the appellant, although not a direct challenge to the Court's first proposition, supra, he argues that since the partnership term expired in October, 1946, and the trial and judgment were not until the following year, the appellee could not be reinstated either voluntarily or by Court order.

Appellee, as has been pointed out, waived his right or reinstatement, but if he had not done so the Court under the cases cited in the footnote of the opening paragraph of this argument, could have ordered his reemployment because after the partnership was dissolved appellant purchased the Cathay House and conducted the business as before, a restaurant for profit. Appellant complains that it was appellee who prayed for a dissolution of the partnership in the State Court. That is immaterial in view of the ap-

pellee's waiver of reinstatement before the Court below, but lest appellant attempt to derive satisfaction from the fact that it was Kan who filed the suit for dissolution it should be added here that such action was more than warranted by the unprovoked and unjustified attack which appellant made on appellee's reputation and character in a letter to the other members of the partnership (Appellee's Exhibit 5, Tr. 115-117), a letter completely uncalled for and without foundation. Appellant pleads the doctrine of estoppel, but where is the prejudice to him to sustain this plea? There is none. The Court's finding adequately disposes of that allegation:

> "Respondent Tsang in no way has been injured by petitioner's delay in instituting this action, such delay having been occasioned by the proceeding in the state court instituted, as hereinabove stated, by the respondent Tsang. Respondent Tsang has likewise not been injured by the appellee in bringing this case to its conclusion, the greater part of such delay being the result of a stipulation between counsel herein. The remaining respondents likewise have not in any way been injured by the delays hereinabove set forth."
>
> (Findings of Fact XVII.)

Appellant also complains that if appellee had a claim for damages for back pay he should have filed it with the Receiver in the State Court proceedings. The Selective Service Act does not impose such obligation on the veteran whose rights have been violated, and by appellant's admission in the footnote on page

3 of his opening brief he alone under Section 2483 of the California Civil Code is the only one responsible for the debts of the enterprise, Cathay House, the other partners being invulnerable.

CONCLUSION.

The Selective Service Act charges the United States Attorney with the responsibility of representing the veteran in the Federal Courts if, in his opinion, the veteran's rights have been denied him by his employer. He, of course, cannot appear on behalf of the veteran in any State proceedings. Just as no presumption in favor of the employer, Tsang, obtains by virtue of the judgment in his favor in the State Courts, so no presumption can be indulged in on the veteran Kan's behalf merely because the United States Attorney felt that his cause was a just cause. The United States Attorney, however, in determining whether or not he would be justified in representing a veteran in a reemployment case has been particularly moved by these significant pronouncements of other Federal tribunals which he most respectfully calls to the attention of this Honorable Court in the firm belief that they will be of great assistance in the rendering of a decision as law and justice and equity require:

> "When a man or woman returned from the service is denied reemployment, the testimony in support of the refusal to so reemploy must be clear, unequivocal and convincing before the Court would be justified in holding that the service man or woman should be denied such reemployment, particularly where an attempt is made

to set aside a solemn promise emanating from the Government of the United States. In this class of cases the presumptions are that the service man or woman is entitled to be reinstated. The immense importance and necessity of the welfare of the one who has served, or who will hereafter serve in the armed forces of the United States, and the welfare of our country as a whole, demand that such refusal should only be successful when the defense is clearly stated and fully substantiated by the proof."

Anderson v. Schonwerer, 63 F. Supp. 808.

"The policy of the Act is stated in Section 1(b), 50 U.S.C.A. App. Sec. 301(b), to be that the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system * * * though such declaration was hardly needed. Every consideration of fairness and justness makes it imperative that the statute should be construed as liberally as possible, so that the military service should entail no greater setback in the private pursuit or career of the returning soldier than is unavoidable. The question here presented, therefore, is not to be solved by the application of abstract tests or formulae; but the factors which usually determine the nature of a disputed relationship must be considered in the light of the purpose which Congress intended to accomplish."

Kay v. General Cable Corp. (C.C.A. 3), 144 F. (2d) 653.

"Promises made to our service men are not to be construed as idle promises, but should be construed as a solemn obligation that the agreements

we have made with them will be lived up to and enforced. To look for technical loopholes which may relieve us of our responsibilities is unthinkable, where the returning service man's interest is at stake, and if there is a doubt as to whether a particular matter is within the scope of the civil relief Act, that doubt should be resolved in favor of the soldier, and in this case the cancellation of the contract is construed by this court as a violation of the agreement and understanding had with defendants at the time of the plaintiff's entry into the service and also as an act prohibited under the Soldiers' and Sailors' Civil Relief Act. If the court is wrong in its judgment this law should be amended so that the men and women in the service will not be fooled into believing that his or her civil rights are secure while they are away fighting for their country."

Stockton v. Ford Motor Co., 61 F. Supp 261.

In view of the foregoing it is respectfully urged that the judgment of the Court below is correct and should be affirmed.

Dated, San Francisco, California
October 1, 1948

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(Appendix Follows.)

Appendix.

Appendix

The pertinent portion of Section 8 of the Selective Training and Service Act of 1940, as amended (50 U.S.C.A. App. 308) reads as follows:

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year.

* * * * * * *

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave

of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."

The pertinent portion of Section 7 of the Service Extension Act of 1940, as amended (50 U.S.C.A. App. 357), reads as follows:

"(a) Any person who subsequent to May 1, 1940, and prior to the termination of the authority conferred by Section 2 of this joint resolution, shall have entered upon active military or naval service in the land or naval forces of the United States shall be entitled to all the reemployment benefits of Section 8 of the Selective Training and Service Act of 1940, as amended, to the same extent as in the case of persons inducted under the Act."

Section 2 of the Service Extension Act of 1940, as amended, above referred to, reads as follows:

"The President is hereby authorized, subject, however, to the condition hereinafter stated, to extend, for such periods of time as may be necessary in the interests of national defense, the periods of service, training and service, enlistment, appointment, or commission, of any or all persons inducted for training and service under the said Act members and units of the reserve components of the Army of the United States (including the National Guard of the United States), retired personnel and enlisted men of the Regular Army, and any other members of the Army, who are now, or who may hereafter be, in or subject to active military service, or training and service: *Provided,* That extension of the periods of active military service, or training and service, in the case of any person subject to the provisions of this secton, shall not, without this consent, exceed eighteen months in the aggregate; except that whenever the Congress declares that it is in the interests of national defense to further extend such periods of active military service and training and service, such periods may be further extended by the President, in the case of any such persons, for such time as may be necessary in the interests of national defense: *Provided further,* That the authority hereby conferred is subject to the condition that the delegation of such authority may be revoked at any time by concurrent resolution of the Congress." Aug. 18, 1941, c. 362, § 2, 55 Stat. 626; 50 U.S.C. App. 352.